Supreme Court, U.S.
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(2)

No. 90-1536

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1990

WARDEN JAMES RAY, *et al.*,

Petitioners,

v.

ROBERT LEE BUTLER, *et al.*,

Respondents.

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. WHETHER THE PETITION FOR WRIT OF CERTIORARI WAS FILED BEYOND THE STATUTORY TIME LIMIT IMPOSED BY 28 U.S.C. §2101(c).

II. WHETHER A DISTRICT COURT JUDGE MAY SUMMARILY DISMISS TWO OF THREE ATTORNEYS, INCLUDING LEAD COUNSEL, FROM AN ONGOING CASE AS A MEANS OF REDUCING THE ATTORNEYS' POTENTIAL FEE AWARD UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT OF 1976.

III. WHETHER A DISTRICT COURT JUDGE MAY COMPEL AN ATTORNEY TO REPRESENT A PARTICULAR LITIGANT AFTER *MALLARD* WHEN SUCH REPRESENTATION WOULD CAUSE ETHICAL AND CASE MANAGEMENT CONFLICTS.

PARTIES

Guy Hunt ..... Defendant-Petitioner
Robin Swift ..... Defendant-Petitioner
Lynn Harrelson ..... Defendant-Petitioner
Morris Thigpen ..... Defendant-Petitioner

Robert Lee Butler* ..... Plaintiff-Respondent
Andy Wayne Daughtry ..... Plaintiff-Respondent
Vincin Davis ..... Plaintiff-Respondent
Lord Divine Allah ..... Plaintiff-Respondent
Gordon Vaughn ..... Plaintiff-Respondent
Lionel Green** ..... Plaintiff-Respondent
Glennon Hoppins*** ..... Plaintiff-Respondent

* Although Robert Lee Butler was dismissed from the case several months after its filing, the case still bears the name *Butler v. Hunt.*

** Lionel Green is not a plaintiff in the *Butler* class action suit. He has an independent action that was consolidated with the *Butler* case at plaintiffs' request. Contrary to the implication carried by defendant-petitioners' footnote no. 1, *see* Petition for Writ of *Certiorari* at 4, Mssrs. Cohen and Schoen did not file a motion to withdraw from Mr. Green's case pursuant to the district court's September 14th order. Rather, both they and Ms. van Alstyne filed a motion to withdraw from Mr. Green's case because of conflicts of interest that were interfering with their ability to effectively represent Mr. Green.

*** Glennon Hoppins is also not a named plaintiff in the *Butler* class action. In fact, the district court's order that Ms. van Alstyne represent him, in violation of the holding in *Mallard*, was the basis for part of plaintiff-respondents' petition for writ of *mandamus*.

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JURISDICTION

The Eleventh Circuit Court of Appeals rendered the judgment on which review is sought in this Court on December 18, 1990. It is plaintiff-respondents' contention that the Court lacks jurisdiction to consider this petition because it was not filed within ninety days of that judgment. *See* 28 U.S.C. 2101(c).

FEDERAL STATUTES

28 U.S.C. §1915(d) -- Proceedings *in forma pauperis*

The court may request an attorney to represent any such person [who is proceeding *in forma pauperis*] unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

28 U.S.C. §2101(c) -- Supreme Court; time for appeal or *certiorari*; docketing; stay

Any other appeal or any writ of *certiorari* intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of *certiorari* for a period not exceeding sixty days.

28 U.S.C. §2071 -- Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

42 U.S.C. §1988 -- Proceedings in vindication of civil rights; attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, ... the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

In early January 1990, plaintiff-respondents filed an amended complaint in a class action lawsuit on behalf of inmates who had been and were being subjected to unconstitutional conditions and to the deprivation of First, Sixth, Eighth and Fourteenth Amendment rights in an Alabama state prison. The suit had originally been filed three years earlier as a *pro se* complaint by Robert Lee Butler, one of the plaintiffs. His complaint, along with those of several other prisoners, had languished at the district court level for some time, in part because the court could not find local counsel willing to undertake representation of inmates in a complex and expensive §1983 action.

Lead counsel in the case was Richard Cohen, litigation director for the Southern Poverty Law Center. Mr. Cohen and David Schoen, a solo practitioner, had previously agreed to accept appointment in a suit by an individual inmate, *Green v. Hunt, et al.*, No. 88-D-1101-N (M.D. Ala. filed Jan. 24, 1990); they entered the *Butler v. Hunt* case, however, without court appointment. An associate of Mr. Cohen's, Abigail van Alstyne, also entered an appearance on behalf of the *Butler* class.

During a status conference held before the magistrate in February 1990, all the inmates who had filed *pro se* complaints alleging unconstitutional conditions in the segregation unit of Kilby Correctional Facility, with the exception of Robert Lee Butler, were informed that their claims would be stayed pending resolution of the *Butler* action. Even though the court had issued a consolidation order two years before counsel entered the case to file the amended complaint, the court exercised its supervisory authority to stay the other actions so that the amended class complaint could be effectively litigated and managed.

Nine months after the amended complaint had been filed,[1] District Court Judge Robert Varner entered an order, *sua sponte*, removing Mssrs. Cohen and Schoen from the case and appointing Ms. van Alstyne as the plaintiffs' sole attorney. During an unrecorded status conference to address the plaintiff-respondents' motion for reconsideration of that order,[2] the judge indicated that his rationale for entering the order was to try to control the amount of attorneys' fees that would be awarded to the plaintiffs should they prevail in the suit. In line with that thinking, he stated that, although Mssrs. Cohen and Schoen could continue to assist Ms. van Alstyne on the case, they would not be permitted to participate in the trial and would not be allowed to recover any fees for future work they performed on the case.

Plaintiffs argued that the judge's order would unjustly tip the balance in favor of the defendants by restricting scores of inmate plaintiffs housed in prisons throughout the state to a single attorney while simultaneously allowing the defendants, state officials with similar defenses, all working within a few miles of their attorneys' offices, to be represented by four attorneys. They also argued that Congress intended attorneys' fee awards to be one of the chief guarantees for the vindication of constitutional and civil rights by poor and powerless citizens, and that state defendants would have little incentive to abide by constitutional dictates if their financial exposure were limited in advance. Plaintiffs also pointed out that the judge's order would have the broad effect of discouraging lawyers and firms from taking on time-consuming and difficult *pro bono* work because

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[1]The case was actively litigated during the nine-month period. Counsel attended several hearings and status conferences, filed several pleadings, and conducted considerable discovery. Counsel for the plaintiffs also stayed in regular communication with their clients.

[2]The plaintiffs had requested a hearing on their motion.

of the possibility that, after devoting several months of hard work and resources to a case, they could be summarily removed. Finally, they argued that the judge's concerns about duplicative fee awards should be addressed at the conclusion of the case through careful scrutiny of any petitions the plaintiffs' attorneys submitted, assuming the plaintiffs prevailed. The judge rejected the arguments.

In addition to removing both lead counsel and co-counsel from the case, the judge ordered Ms. van Alstyne, the sole remaining plaintiffs' attorney, to represent a *pro se* inmate, Glennon Hoppins, whose seven independent actions were supposed to have been stayed by the magistrate's decision in February 1990.[3] Ms. van Alstyne informed the court that she was unwilling to accept an appointment to represent Mr. Hoppins. She expressed her belief that such an appointment would engender serious ethical problems under the Code of Professional Responsibility and that litigating Mr. Hoppins' cases with the *Butler* action would create a serious conflict of interest that might defeat class certification and would unquestionably delay the trial and resolution of the *Butler* case.

The ethical conflicts were fully explained to the court. Mr. Hoppins had vigorously objected to being represented, even indirectly, by attorneys from the Southern Poverty Law Center during the February 1990 status conference. Moreover, he had been uncooperative with plaintiffs' counsel during subsequent interactions and had refused to follow their advice or counsel. Of equal importance, Mr. Hoppins' tactics and litigation goals were in substantial conflict with those endorsed by the *Butler*

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[3]Although many of Mr. Hoppins' cases raise issues that are included in the *Butler* case, many of them also contain allegations and claims that are completely different. For example, Mr. Hoppins has sued over the classification system, conditions in prison dormitories, procedures relating to the treatment of aged inmates, and rights to privacy in the medical screening context. Those issues are beyond the scope of the *Butler* action.

plaintiffs, and counsel firmly believed that having to represent Mr. Hoppins along with the *Butler* class representatives would impede the orderly and sympathetic presentation of the *Butler* case.

When plaintiff-respondents' motion for reconsideration was denied by the district court judge, plaintiffs filed a petition for writ of *mandamus* with the Eleventh Circuit Court of Appeals. On December 18, 1990, the circuit court ordered that the writ be granted both as to the summary removal of the two attorneys and the order appointing Ms. van Alstyne to represent Mr. Hoppins. The Eleventh Circuit declined to consider the issue of the judge's proposed consolidation of all *pro se* inmate conditions suits pending in other judicial districts in Alabama on grounds that the question was not ripe.

ARGUMENT

I. *INTRODUCTION*

The petition for writ of *certiorari* should be denied for two independent reasons. First, it was not filed within the time period prescribed by Supreme Court Rule 13.4. Second, it does not meet any of the requirements for this Court's discretionary review under Supreme Court Rule 10.1.

II. *THE PETITION WAS NOT TIMELY FILED*

The threshold issue for consideration in this case is whether the petitioners' application for a writ of *certiorari* should be dismissed because it was not timely filed.

On December 18, 1990, a panel of Eleventh Circuit judges issued a *per curiam* decision and order granting in part and

denying in part plaintiff-respondents' petition for a writ of *mandamus* to the United States District Court for the Middle District of Alabama. The decision was filed the same day in the Eleventh Circuit Clerk's office. The court stated in pertinent part that it was "issu[ing] a writ of *mandamus* to the United States District Court for the Middle District of Alabama" directing the judge in question to vacate specific parts of an order he had entered. On December 19, 1990, the day following the court's order, the Clerk prepared a writ of *mandamus* "in conformity with this court's opinion of December 18, 1990."

Petitioners did not file their petition for writ of *certiorari* in the United States Supreme Court until March 19, 1991. The Clerk of the Court refused to docket it, in part because it was submitted out of time. Petitioners refiled the petition on April 4, 1991, claiming that the relevant date of judgment for purposes of Supreme Court Rule 13.1 was December 19, 1990, the date the writ was typed and signed by the Eleventh Circuit Clerk's office, rather than December 18, 1990, the date that the Eleventh Circuit rendered judgment.

An application for a writ of *certiorari* is untimely if filed more than ninety days after entry of the judgment sought to be reviewed. 28 U.S.C. §2101(c). Because the 90-day limit is "mandatory and jurisdictional," the Court must dismiss the State's petition if it was untimely filed. *Missouri v. Jenkins*, ___ U.S. ___, 110 S.Ct. 1651,1660 (1990).

Rule 13.4 of the Supreme Court Rules provides that the "time for filing a petition for a writ of *certiorari* runs from the date the judgment or decree sought to be reviewed is rendered, not from the date of the issuance of the mandate (or its equivalent under local practice)" [emphasis added]. The judgment or decree sought to be reviewed in this case is the decision of the Eleventh Circuit to grant the respondents' petition

for a writ of *mandamus*.[4] It was that decision that fixed the rights and obligations of the parties and that decision that "settled with finality" the issues that had been litigated. *See FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206,212 (1952).

To suggest that the Circuit Clerk's ministerial act of preparing and mailing the formal Writ of Mandamus clarified or explicated rights or obligations of the parties that were, until that time, not certain, is to ignore reality. *See Cole v. Violette*, 319 U.S. 581 (1943)(court's order was final on date of issuance, not on date clerk performed ministerial act of entering judgment, because the order itself disposed of all issues in the case). The judgment of the appellate court was neither "tentative, informal nor incomplete." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507,514 (1950); *cf. Scofield v. NLRB*, 394 U.S. 423,427 (1969) (opinion that called for further court action was not the final judgment and did not set the 90 day time limit running). To the contrary, the order was a "complete act of adjudication" and was clearly intended by the judges to dispose of all matters then pending before them in the case. *See U.S. v. Schaefer Brewing Co.*, 356 U.S. 227, 234-235 (1958).

The fact that December 18th rather than December 19th is the date judgment was rendered in this case is underscored by another simple fact. The December 18th decision is the only document that addresses each of the three issues on which plaintiff-respondents sought a writ of *mandamus*. Clearly, had plaintiff-respondents wished to request a rehearing in the

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[4]That the judgment sought to be reviewed is not the clerk's December 19th clerical act but the court's December 18th decision is acknowledged in the first sentence of petitioners' application:

> The petitioners respectfully pray that a writ of *certiorari* issue to review the granting of *mandamus* that the Eleventh Circuit Court of Appeals has issued to the Honorable Robert Varner, United States District [judge] for the Middle District of Alabama.

appellate court or to petition this Court for a writ of *certiorari* on the one issue that the Eleventh Circuit declined to consider for *mandamus* relief, the deadline for their doing so necessarily would have begun to run on December 18th, because no other "judgment" in the case fully adjudicated and finally settled the parties' respective rights.

III. *THERE ARE NO REASONS FOR GRANTING DISCRETIONARY REVIEW.*

Even if the Court determines that the petition in this case should not automatically be dismissed for having been untimely filed, the Court should refuse to grant the writ for three related reasons.

First, there are no "special and important reasons" for a grant of *certiorari* here. S. Ct. R. 10.1. Defendant-petitioners seek review of a procedural ruling that has been presented to this Court with different arguments and allegations than those advanced by defendant-petitioners to the court of appeals.

The dispositive issues in the petition for writ of *mandamus* were: (1) whether a judge could enter an order that removed two of three attorneys, including lead counsel, from a civil rights action they had decided to handle for a class of indigent prisoners under the speculative theory that, if successful in the litigation, their claim for fees under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, might contain duplicative billing; and (2) whether a judge could require an attorney to represent a particular individual despite ethical and professional conflicts related to that representation. Defendant-petitioners have done nothing in their petition other than to gloss over those issues, raise others that depend on a factual record that is not present here, *see Mishkin v. New York,* 383 U.S. 502 (1966), and rehash the arguments that the Eleventh Circuit already decided against them.

Second, none of the questions presented in the petition has much of anything to do with the facts of this case. Whether federal courts have inherent authority to require a lawyer to represent a particular litigant is not at issue here. When the district court issued its September 14, 1990 order appointing Ms. van Alstyne to represent Mr. Hoppins and directing that she be the sole attorney for the existing plaintiff class, it did so under that section of the United States Code dealing with the representation of indigents "unable to employ counsel." 28 U.S.C. §1915(d). There simply is no reason to assume that the court was proceeding on a more nebulous basis, given the fact that the federal statute directly governs such appointments. The fact that the district court's order did not specify the statutory provision under which the appointment was made hardly suffices as proof that it was made on any other basis. In fact, it stands to reason, given the decision in *Mallard v. U.S. Dist. Ct.*, ___ U.S. ___, 109 S. Ct. 1814 (1989), that if a court were trying to make a coercive or compulsory appointment of counsel, it would specifically note the basis for its action in order to distinguish its order from the typical request made pursuant to §1915(d).

The question of whether the courts' rule-making authority under 28 U.S.C. §2071 and Rule 83 of the Federal Rules of Civil Procedure might one day lead to the promulgation of a rule allowing the appointment of counsel in civil cases under some authority other than 28 U.S.C. §1915(d) is also not at issue in this case. At the present time, neither Rule 83 nor 28 U.S.C. §2071 endows the court with express authority to appoint counsel. And local rules for the Middle District of Alabama presently contain no reference to the appointment of counsel in civil cases. In addition, the general principle that district judges may regulate the conduct of litigation in their courtrooms cannot be transformed into a postulate that they have the power to enter orders that are inconsistent with or superfluous to statutory law.

Whether a *pro se* litigant is entitled to more than one court-appointed attorney is likewise not an issue in the case, given that the proposed plaintiff class in *Butler v. Hunt,* the case on which *certiorari* is being sought, never had any appointed counsel until the court's order of September 14, 1990, and it acquired only one attorney at that time.[5] The real issue in the case has nothing to do with the test for effective assistance of defense counsel articulated in *Strickland v. Washington*, 466 U.S. 668 (1984), or with the question of "entitlement" to more than one court-appointed attorney in a criminal case. Rather, it has to do with the right of a judge to unreasonably and arbitrarily interfere with *pro bono* representation in a complex civil rights case under §1983 and with long-standing attorney-client relationships established between indigent litigants and their attorneys.

Finally, the question of "whether a writ of *mandamus* was improperly [sic] issued when there was no usurpation of power nor [sic] abuse of discretion" by the district court is nothing more than a conclusory allegation that calls for second-guessing the reasoned judgment of the court of appeals on factual issues presented in the *mandamus* petition. *Certiorari* is not granted for the purpose of reweighing evidence and reconsidering factual determinations. *See* S. Ct. R. 10.1.

Third, defendant-petitioners did not create a record below that supports many of their assertions. This is the first time, for example, that defendant-petitioners have explicitly claimed that the order appointing Ms. van Alstyne was not entered under the

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[5]Counsel for the defendant-petitioners have continuously ignored the fact that cases which are consolidated retain their separate identities. *See, e.g., McKenzie v. United States*, 678 F.2d 571 (5th Cir. 1982). They seem to believe that because an absent member of the class with ten pro se cases pending was appointed an attorney who later became involved in the *Butler* action, and another absent class member was appointed two attorneys, both of whom entered an appearance in the *Butler* class, the *Butler* plaintiffs themselves have court-appointed counsel. In fact, counsel voluntarily entered an appearance on behalf of the *Butler* plaintiffs and were never appointed to that case.

authority of 28 U.S.C. §1915(d). *See* Petition for Writ of *Certiorari* at 4.

In their responsive pleading to plaintiff-respondents' petition for writ of *mandamus*, defendant-petitioners never made such an assertion. Had there been any evidentiary basis for doing so, defendant-petitioners clearly would have argued that the holding in *Mallard* had nothing to do with the case. Instead, they argued that *Mallard* could be distinguished from the *Butler* case because the district court judge in *Mallard* had never been made a party to that action and because the *Butler* plaintiffs allegedly had alternative avenues available to them to obtain the desired relief short of a petition for writ of *mandamus*.[6]

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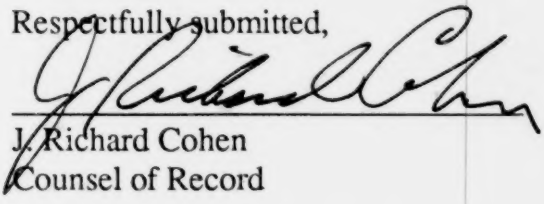
[6]Defendant-petitioners incorrectly argued in their answer to the plaintiffs' petition for writ of *mandamus* that the Court in *Mallard* "based its decision on the fact that no alternative remedies existed," and they have repeatedly emphasized the fact that the district court judge in that case was not made a litigant. Of course, the reason for the latter point was that Mallard's petition for a writ of *mandamus* had been erroneously denied by the Eighth Circuit. *Mallard*, 109 S.Ct. at 1822. With regard to defendant-petitioners' claim that alternative means existed for plaintiff-respondents to obtain relief from the judge's improper order, the Eleventh Circuit specifically found otherwise in its order.

CONCLUSION

Plaintiff-respondents urge the Court to deny this petition for writ of *certiorari* either because of its untimely filing or because of its failure to present issues and an unambiguous record that call for the Court's exercise of discretionary review.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served copies of the foregoing by U. S. Mail, postage prepaid, on Alice Ann Boswell of the Alabama Department of Corrections, Legal Division, Gordon Persons Building, 50 N. Ripley Street, Montgomery, Alabama 36130; on David Byrne, Esq., Robison & Belser, 210 Commerce Street, Post Office Drawer 1470, Montgomery, Alabama 36102, and on Milt Belcher, Assistant Attorney General, Office of the Attorney General, 11 South Union Street, Montgomery, Alabama 36130 on this 6TH day of May, 1991.

Abigail P. van Alstyne
Attorney for Plaintiffs